

DEPARTMENT OF THE ARMY

IBLA 85-422

Decided December 19, 1986

Appeal from a decision of the Las Vegas District Office, Nevada, Bureau of Land Management, rejecting right-of-way application, N-41321.

Affirmed.

1. Withdrawals and Reservations: Generally

Under 43 U.S.C. §§ 155-158 (1982), known as the Engle Act, the Secretary of the Interior is authorized to process Department of the Defense applications for national defense withdrawals. Where such applications aggregate 5,000 acres or more for any one project or facility, the withdrawal may only be made by an Act of Congress, except in time of war or national emergency, and except as otherwise expressly provided in the Act.

2. Federal Land Policy and Management Act of 1976:
Rights-of-Way--Rights-of-Way: Applications

Use of public lands for the purpose of conducting military maneuvers is not properly authorized pursuant to the grant of a right-of-way under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982).

APPEARANCES: William P. Cheadle, Jr., for the Department of the Army, Corps of Engineers.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Department of the Army, Corps of Engineers (COE), has appealed a decision dated January 3, 1984, of the Las Vegas District Office, Nevada, Bureau of Land Management (BLM), rejecting right-of-way application N-41321.

On December 24, 1985, COE filed an application for approximately 8,310.03+/- acres 1/ to be used for maneuver and tactics training at tank platoon and battalion level. The application was filed in part on Standard

1/ The lands requested are in T. 22 S., Rs. 62 and 63 E.; T. 23 S., Rs. 62 and 63 E.; and T. 24 S., Rs. 62 and 63 E., Mt. Diablo Meridian, Clark County, Nevada.

Form 299 (11-83) entitled "Application for Transportation and Utility Systems and Facilities on Federal Lands." On the form appellant specified that it was attempting to "[r]enew existing authorization No. TUP NS-80-23," under which, according to COE, a unit had been operating in the area for more than 10 years.

BLM's decision characterized the application as a right-of-way and rejected it on the ground that a right-of-way was not the proper authorization for the proposed type of use. In a letter accompanying the decision, the District Manager explained that a withdrawal pursuant to 43 CFR 2300 would be the appropriate authorization for appellant's proposed use of the lands. The regulations at 43 CFR 2300 set forth the procedures implementing the Secretary's authority to process withdrawals.

In the statement of reasons for appeal, appellant expresses the desire to obtain use of the lands by means other than withdrawal. Appellant acknowledges that more than 5,000 acres are being sought and argues that years could be spent waiting for congressional approval of a withdrawal, which would be required.

[1] As appellant appears to be aware, section 2 of the Act of February 28, 1958, 72 Stat. 28, 43 U.S.C. § 156 (1982), sometimes referred to as the Engle Act, requires congressional approval of any withdrawal or "restriction of" the public lands aggregating more than 5,000 acres for any one defense project or facility. See also 43 CFR 2300.0-3(a)(3). The purpose of the Engle Act was to return from the executive branch to Congress the responsibility imposed by the Constitution for management of the public lands and waters. See 1958 U.S. Code Cong. and Ad. News at page 2229.

[2] Appellant had obtained prior authorization to use the land under a special land use permit, TUP NS-80-23. 2/ In seeking reauthorization, appellant filed an application for a right-of-way under section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1982). Without deciding whether or not the filing of a withdrawal application pursuant to 43 CFR Part 2300 is the only possible way to authorize the use contemplated, 3/ it is clear that it is not among the purposes authorized under FLPMA right-of-way provisions. The decision of the Las Vegas District Office must be affirmed.

2/ The Board expresses no view as to whether the use of the land contemplated by appellant was properly authorized under the regulations relating to special use permits, 43 CFR Subpart 2920 (1974). But see Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), cert. denied, 411 U.S. 917.

3/ We note, however, that under section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1982), the Secretary may permit other Federal agencies to use, occupy, and develop public lands only through rights-of-way, withdrawals, or cooperative agreements.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed.

James L. Burski
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Will A. Irwin
Administrative Judge

